A

ABDULLAH ATAN v. PP & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
B VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
HASNAH MOHAMMED HASHIM FCJ
MARY LIM FCJ
[CRIMINAL APPEALS NO: 05(M)-56-02-2019(J),
C 05(M)-205-09-2018(W), 05(M)-206-09-2018(W)
& 05(LB)-207-09-2018(W)]
26 AUGUST 2020

D ***CRIMINAL PROCEDURE:*** *Prosecution – Prima facie case – Charges under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA') – Presumption of trafficking under s. 37(da) of DDA – Whether constitutes credible evidence for prosecution to make out prima facie case under s. 180(4) of Criminal Procedure Code ('CPC') – Whether prosecution required to prove each ingredient of offence by credible offence under s. 180(4) of CPC – Whether reading s. 180(4) CPC with exclusion of*
E *presumptions unsustainable*

SP4 and his team were on duty when SP4 saw Abdullah Atan ('Abdullah') standing by the road side. When SP4 approached Abdullah and introduced himself as a police officer, Abdullah took flight but was apprehended. Information disclosed by Abdullah led to the discovery of the drugs, the
F subject matter of the charge against him under s. 39B(1)(a) read together with s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). The trial judge found that the prosecution had made out a *prima facie* case and invoked the presumption under s. 37(da) of the DDA to hold that the prosecution had also proved the element of trafficking. After hearing the defence, the trial
G judge found that Abdullah had failed to rebut, on a balance of probabilities, the statutory presumption under s. 37(da) of the DDA and had failed to raise a reasonable doubt on the prosecution's case. Abdullah was thus convicted and sentenced to death under s. 39B of the DDA. Based on the prosecution's narrative, Mahmood Yary Mohammad ('Mahmood'), Muhammad Reza Ghaem Panah Nezamali ('Reza') and Hasan Javadipirouz Avazali ('Hasan'),
H were apprehended whilst fleeing from the house which was under police surveillance. The police discovered boxes of drugs containing 15,821g of methamphetamine alongside other evidence, which essentially established the fact that the house was used to manufacture drugs. Mahmood, Reza and Hasan were jointly charged under s. 39B(1)(a) of the DDA. The trial judge
I made positive findings that they were in possession of the drugs and based on the weight of the drugs, invoked the presumption of trafficking under

s. 37(da) of the DDA to find a *prima facie* case of trafficking. The trial judge found the defence by the accused persons were bare denials and that all the accused persons had failed to rebut the presumption of trafficking on a balance of probabilities and failed to raise a reasonable doubt on the prosecution's case. They were accordingly convicted and sentenced to death under s. 39B of the DDA.

The Court of Appeal dismissed the appeals by Abdullah, Reza and Hassan. However, Mahmood's appeal was allowed on the ground that the trial judge had erred in law and in fact in finding that Mahmood had custody and control of the impugned drugs. Hence, the appeals herein by Abdullah, Reza and Hasan against the decision of the Court of Appeal affirming their convictions and sentence, and by the Public Prosecutor against the acquittal and discharge of Mahmood. The common point of law raised for the court's determination was whether, in the trial of a charge for drug trafficking under s. 39B of the DDA, the presumption of trafficking in s. 37(da) of the DDA constitutes credible evidence for the prosecution to make out a *prima facie* case under s. 180(4) of the Criminal Procedure Code ('CPC').

Held (dismissing appeals)
Per Tengku Maimun Tuan Mat CJ delivering the judgment of the court:

(1) The purpose of s. 180(4) of the CPC was to not exclude the use of presumptions, inferences or anything other than direct evidence to establish a *prima facie* case. Reading s. 180(4) in light of its context and legislative purpose, the phrase 'credible evidence proving each ingredient of the offence' means that the prosecution may prove each ingredient of the offence either: (i) by adducing credible direct evidence of that ingredient; (ii) by drawing inferences of fact, *ie*, adducing credible circumstantial evidence, from which the ingredient can be inferred; or (iii) by invoking presumptions of law, *ie*, by adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists. (paras 41-43)

(2) A presumption is not evidence; rather, it is a rule of evidence stating how a particular fact can be proved. This court has endorsed the use of the presumption under s. 37(da) of the DDA by the prosecution to establish a *prima facie* case of drug trafficking. What is required of the prosecution is to adduce credible evidence of the basic facts in order to rely on the presumption of trafficking in s. 37(da). (paras 46 & 47)

(3) On a proper construction, to make out a *prima facie* case under s. 180(4) of the CPC, credible evidence is still required for a *prima facie* finding of actual possession. It is then that the presumption of trafficking kicks in for the accused to disprove, on a balance of probabilities, that he did

A not traffic in the dangerous drugs. Any other construction would be against the weight of settled judicial precedent. It would render the entire presumption regime superfluous, devoid of any utility and would effectively amount to a repeal of s. 37(da) of the DDA. Hence, the proposed interpretation of s. 180(4) of the CPC to exclude presumptions
B was unsustainable as such a reading is unsupported by its legislative purpose, and leads to far-reaching consequences in criminal law. (paras 60 & 74)

(4) Having found that actual or affirmative possession of the impugned drugs by the accused had been established based on credible evidence
C and the weight of the drugs in question had exceeded the statutory limit, the trial judges were entitled to find that a *prima facie* case had been made out under s. 180(4) of the CPC, by invoking the presumption of trafficking under s. 37(da) of the DDA. This approach is correct in law. (para 61)

D **(5)** There was no error in the inference drawn by the trial judge that Reza and Hasan knew that the substances found in the house were illicit drugs. The discovery of various apparatus, laboratory equipment and chemical substances in the house and the testimony of the chemist on the use and functions of those apparatus, equipment and substances, lend credence
E to the proposition that the house was used as a clandestine drug laboratory. The overwhelming inference was that Reza and Hasan could not have no knowledge of what was transpiring in the house. Although this was not the usual type of trafficking as it involved the manufacturing of drugs, there was no error in the finding of the courts below that the
F element of custody and control and knowledge had been proven and that actual possession of the impugned drugs had been established. On the totality of the evidence, the convictions of both Reza and Hasan were safe. (paras 67-69)

(6) There was no appealable error in the findings of the Court of Appeal in
G respect of Mahmood. There was no evidence to establish the fact that it was Mahmood who was seen entering the house during the surveillance period and none of the witnesses testified that it was Mahmood who was seen in the car. Mahmood's version of his defence that he went to the house to deliver food was mentioned in his statement
H to the police. On the totality of the evidence, the conviction of Mahmood was unsafe, and therefore, there was no reason to disturb the conclusion of the Court of Appeal that the element of possession was not proven by the prosecution against Mahmood. (paras 70 & 72-74)

I

Bahasa Melayu *Headnotes*

SP4 dan pasukannya sedang menjalankan tugas apabila SP4 melihat Abdullah Atan ('Abdullah') berdiri di tepi jalan. Apabila SP4 menghampiri Abdullah dan memperkenalkan dirinya sebagai pegawai polis, Abdullah melarikan diri tetapi telah ditangkap. Maklumat yang didedahkan oleh Abdullah menjurus pada penemuan dadah-dadah, perkara pertuduhan terhadapnya bawah s. 39B(1)(a) dibaca bersama-sama dengan s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Hakim bicara mendapati pihak pendakwaan berjaya membuktikan kes *prima facie* dan membangkitkan anggapan bawah s. 37(da) ADB untuk memutuskan bahawa pihak pendakwaan juga telah membuktikan elemen pengedaran. Selepas mendengar pembelaan, hakim bicara mendapati Abdullah gagal mematahkan, atas imbangan kebarangkalian, anggapan statutori bawah s. 37(da) ADB dan gagal membangkitkan keraguan munasabah terhadap kes pendakwaan. Abdullah, oleh itu, disabitkan dan dijatuhkan hukuman mati bawah s. 39B ADB. Menurut naratif pendakwaan, Mahmood Yary Mohammad ('Mahmood'), Muhammad Reza Ghaem Panah Nezamali ('Reza') dan Hasan Javadipirouz Avazali ('Hasan'), ditangkap semasa melarikan diri dari rumah yang berada bawah pengawasan pihak polis. Polis menemui kotak-kotak dadah mengandungi 15,821g methamphetamine bersama-sama dengan keterangan lain yang, pada asasnya, membentuk fakta bahawa rumah itu digunakan untuk membuat dadah. Mahmood, Reza dan Hasan dituduh bersama-sama bawah s. 39B(1)(a) ADB. Hakim bicara membuat dapatan positif bahawa mereka mempunyai milikan dadah dan berdasarkan berat dadah, membangkitkan anggapan pengedaran bawah s. 37(da) ADB untuk membuat dapatan *prima facie* kes pengedaran. Hakim bicara mendapati pihak pembelaan gagal mematahkan anggapan pengedaran atas imbangan kebarangkalian dan gagal membangkitkan keraguan munasabah terhadap kes pendakwaan. Oleh itu, mereka disabitkan dan dijatuhkan hukuman mati bawah s. 39B ADB.

Mahkamah Rayuan menolak rayuan-rayuan Abdullah, Reza dan Hassan. Walau bagaimanapun, rayuan Mahmood dibenarkan atas alasan bahawa hakim bicara terkhilaf dari segi undang-undang dan fakta apabila mendapati Mahmood mempunyai jagaan dan kawalan dadah-dadah yang dipersoalkan. Oleh itu, rayuan-rayuan ini oleh Abdullah, Reza dan Hasan terhadap keputusan Mahkamah Rayuan mengesahkan sabitan dan hukuman, dan oleh Pendakwa Raya terhadap pembebasan dan pelepasan Mahmood. Isu undang-undang bersama yang ditimbulkan untuk pertimbangan mahkamah adalah, sama ada, dalam perbicaraan pertuduhan pengedaran dadah bawah s. 39B ADB, anggapan pengedaran dalam s. 37(da) ADB membentuk keterangan kredibel untuk pihak pendakwaan membuktikan kes *prima facie* bawah s. 180(4) Kanun Tatacara Jenayah ('KTJ').

Diputuskan (menolak rayuan-rayuan)
Oleh Tengku Maimun Tuan Mat KHN menyampaikan penghakiman mahkamah:

(1) Tujuan s. 180(4) KTJ adalah untuk tidak mengecualikan penggunaan anggapan, inferens atau apa-apa selain daripada keterangan langsung untuk membuktikan kes *prima facie*. Membaca s. 180(4) berdasarkan konteks dan tujuan perundangannya, frasa 'keterangan kredibel membuktikan setiap satu unsur kesalahan' bermaksud pendakwaan boleh membuktikan setiap unsur kesalahan sama ada: (i) dengan mengemukakan keterangan langsung yang kredibel untuk unsur itu; (ii) dengan membuat inferens fakta, iaitu, mengemukakan keterangan ikut keadaan yang kredibel, yang daripadanya unsur tersebut boleh ditanggap; atau (iii) dengan membangkitkan anggapan-anggapan di sisi undang-undang, iaitu, dengan mengemukakan keterangan kredibel tentang fakta asas yang relevan, untuk membangkitkan anggapan statutori bahawa unsur itu wujud.

(2) Anggapan tidak membentuk keterangan, sebaliknya, adalah kaedah keterangan yang menyatakan bagaimana fakta tertentu boleh dibuktikan. Mahkamah ini menyokong penggunaan anggapan bawah s. 37(da) ADB oleh pihak pendakwaan untuk membuktikan kes *prima facie* pengedaran. Apa yang diperlukan daripada pihak pendakwaan ialah pengemukaan keterangan kredibel fakta asas untuk bersandar pada anggapan pengedaran dalam s. 37(da).

(3) Atas pentafsiran wajar, untuk membuktikan kes *prima facie* bawah s. 180(4) KTJ, keterangan kredibel masih diperlukan untuk dapatan *prima facie* milikan sebenar. Selepas itu barulah anggapan pengedaran timbul untuk tertuduh menyahbuktikan atas imbangan kebarangkalian bahawa dia tidak mengedar dadah berbahaya. Apa-apa pentafsiran lain adalah bertentangan dengan duluan kehakiman yang terbukti. Ini akan menyebabkan keseluruhan rejim anggapan tidak diperlukan, tiada apa-apa kegunaan dan secara efektifnya membentuk pemansuhan s. 37(da) DDA. Oleh itu, pentafsiran s. 180(4) KTJ yang dicadangkan untuk mengecualikan anggapan tidak boleh dikekalkan kerana bacaan sedemikian tidak disokong oleh tujuan perundangan, dan akan menjurus pada akibat-akibat yang mempunyai kesan meluas dalam undang-undang jenayah.

(4) Setelah mendapati milikan sebenar atau afirmatif, dadah-dadah yang dipersoalkan, oleh tertuduh dibuktikan berdasarkan keterangan kredibel dan berat dadah-dadah itu melampaui limit statutori, hakim bicara berhak membuat dapatan bahawa kes *prima facie* dibuktikan bawah s. 180(4) KTJ, dengan membangkitkan anggapan pengedaran bawah s. 37(da) ADB. Pendekatan ini betul di sisi undang-undang.

(5) Tiada kekhilafan dalam inferens yang dibuat oleh hakim bicara bahawa Reza dan Hasan mengetahui bahawa bahan-bahan yang didapati di dalam rumah itu adalah dadah-dadah haram. Penemuan perkakas-perkakas, peralatan makmal dan bahan-bahan kimia dalam rumah itu dan keterangan ahli kimia tentang kegunaan dan fungsi perkakas-perkakas, peralatan dan bahan-bahan tersebut mengukuhkan usul bahawa rumah itu digunakan sebagai makmal dadah rahsia. Inferens besar adalah bahawa Reza dan Hasan tidak mungkin tiada pengetahuan tentang apa yang berlaku di rumah itu. Walaupun ini bukan bentuk pengedaran biasa kerana ini melibatkan pembuatan dadah, tiada kekhilafan dalam dapatan mahkamah di bawah bahawa elemen kawalan dan jagaan serta pengetahuan telah dibuktikan dan bahawa milikan sebenar dadah yang dipersoalkan telah dibuktikan. Atas keseluruhan keterangan, sabitan-sabitan Reza dan Hasan adalah selamat.

(6) Tiada kekhilafan yang boleh dirayu dalam dapatan Mahkamah Rayuan berkaitan dengan Mahmood. Tiada keterangan untuk membuktikan fakta bahawa Mahmood dilihat memasuki rumah semasa tempoh pengawasan dan tiada saksi memberi keterangan bahawa Mahmood yang dilihat memasuki dalam kereta. Versi pembelaan Mahmood bahawa dia pergi ke rumah itu untuk menghantar makanan dinyatakan dalam kenyataan polisnya. Atas keseluruhan keterangan sabitan Mahmood tidak selamat, dan oleh itu, tiada sebab untuk mengganggu kesimpulan Mahkamah Rayuan bahawa elemen milikan tidak dibuktikan oleh pendakwaan terhadap Mahmood.

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
In the Matter of Application No. 578 of 1940 To The Rent Assessment Board; Ex Parte Tan Swee Eng [1941] 1 LNS 20 HC ***(refd)***
Haw Tua Tau v. PP & Other Cases [1981] CLJ 123; [1981] CLJ (Rep) 11 PC ***(refd)***
Jazlie Jaafar v. PP [2020] 2 CLJ 28 FC ***(refd)***
Khoo Hi Chiang v. PP And Another Case [1994] 2 CLJ 151 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2020] 1 CLJ 1 FC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Chin Yoke [1939] 1 LNS 66 HC ***(refd)***
PP v. Gan Boon Aun [2017] 4 CLJ 41 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Soo Sing & Ors v. PP [1951] 1 LNS 86 HC ***(refd)***

A *Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC* ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
The PP, Johore v. Fong Ah Tong And Cheong Chi Shen [1940] 1 LNS 110 HC ***(refd)***
Webb v. Outrim (1907) AC 81 ***(refd)***

Legislation referred to:

B Criminal Procedure Code, s. 180(1), (4)
Dangerous Drugs Act 1952, ss. 37(a), (b), (c), (d), (da), (e), (f), (g), (h), (i), 39B(1)(a)
Evidence Act 1950, s. 27

(Criminal Appeal No: 05(M)-56-02-2019(J))
C *For the appellant - Teh Poh Teik & Sukhaimi Mashud; M/s Teh Poh Teik & Co*
For the respondent - Mohd Dusuki Mokhtar & Asmah Musa; DPPs

(Criminal Appeal No: 05(M)-205-09-2018(W)
For the appellant - Teh Poh Teik & Sukhaimi Mashud; M/s Teh Poh Teik & Co
For the respondent - Mohd Dusuki Mokhtar & Nahra Dollah; DPPs

D *(Criminal Appeal No: 05(M)-206-09-2018(W))*
For the appellant - Kitson Foong & Chew Jee San; M/s Kit & Assocs
For the respondent - Hanim Mohd Rashid; DPP

(Criminal Appeal No: 05(LB)-207-09-2018(W))
For the appellant - How May Ling; DPP
E *For the respondent - Kamarul Hisham & Syafiqah Sofian; M/s The Chambers of Kamarul Hisham & Hasnal Rezua*

Reported by S Barathi

JUDGMENT

F **Tengku Maimun Tuan Mat CJ:**

Introduction

[1] The following four appeals:

(i) 05(M)-56-02-2019(J) between *Abdullah Atan* ("*Abdullah*") *v. PP*;

G (ii) 05(M)-205-09-2018(W) between *Mohamad Reza Ghaem Panah Nezamali* ("*Reza*") *v. PP*;

(iii) 05(M)-206-09-2018(W) between *Hasan Javadipirouz Avazali* ("*Hasan*") *v. PP*; and

H (iv) 05(LB)-207-09/2018(W) between *PP v. Mahmood Yary Mohammad* ("*Mahmood*"),

were heard together as they raised a common point of law, ie, whether, in the trial of a charge for drug trafficking under s. 39B of the Dangerous Drugs Act 1952 ("the DDA"), the presumption of trafficking in s. 37(da) of the I DDA constitutes credible evidence for the prosecution to make out a *prima facie* case under s. 180(4) of the Criminal Procedure Code ("the CPC").

[2] Abdullah was convicted by the High Court at Johor Bahru while Mahmood, Reza and Hasan were convicted by the High Court at Kuala Lumpur, for the offence of trafficking in dangerous drugs. They were sentenced to death under s. 39B of the DDA.

[3] Aggrieved by the decision of the High Court, they appealed to the Court of Appeal. The Court of Appeal dismissed the appeals by Abdullah, Reza and Hasan but allowed the appeal by Mahmood. Hence the appeals before us by Abdullah, Reza and Hasan against the decision of the Court of Appeal affirming their convictions and sentence, and by the Public Prosecutor against the acquittal and discharge of Mahmood.

Background Facts

Appeal No. 56 (Abdullah's Case)

[4] The charge against Abdullah reads:

> Bahawa kamu pada 15/5/2016 jam lebih kurang 04.45 petang, di bilik sewa Nombor 16-01, Jalan Permas 4/4, Bandar Baru Permas Jaya, dalam Daerah Johor Bahru, dalam Negeri Johor, telah didapati mengedar dadah berbahaya jenis Cannabis seberat bersih 4,213 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[5] Briefly, the narrative of the prosecution's case is as follows. On 15 May 2016, Insp Mohd Nasaruddin bin Adnan ("SP4") and his team were on duty at the Permas Jaya area, where SP4 saw Abdullah standing by the road side. After observing Abdullah for about 15 minutes, SP4 approached Abdullah. SP4 introduced himself as a police officer. Abdullah immediately took flight. SP4 gave chase and Abdullah was apprehended.

[6] A body search was conducted on Abdullah. Nothing incriminating was found. Abdullah had a set of keys which were seized by SP4.

[7] It was the prosecution's case that upon interrogation, Abdullah disclosed information that led to the discovery of the impugned drugs at No. 16-01, Jalan Permas 4/4, Permas Jaya, Johor Bahru ("the premises"), a double-storey shop-house. SP4 and his men gained entry to the premises using one of the keys seized from Abdullah. According to SP4, upon further questioning, Abdullah pointed to a room. The room was locked and using another key from the set seized earlier, SP4 unlocked the door. Upon gaining access, SP4 asked Abdullah where he kept the drugs. Using his right foot, Abdullah indicated that the drugs were under a table in the room.

[8] SP4 recovered an orange plastic bag wherein there were five compressed slabs. On analysis by the chemist, the drugs were confirmed to be cannabis, the subject matter of the charge.

[9] The learned trial judge found that the prosecution had made out a *prima facie* case against Abdullah. Pursuant to s. 27 of the Evidence Act 1950, the learned judge admitted the information given by Abdullah, upon which the drugs were found. His Lordship found that the statement under s. 27 "enabled knowledge of the existence and the whereabouts of the drugs and its nature to be attributed to the accused. As the accused had such knowledge, the mental element required to establish possession was therefore present".

[10] Having found that Abdullah had actual possession of the impugned drugs, and given the weight of the drugs which exceeded the statutory minimum amount, His Lordship invoked the presumption under s. 37(da) of the DDA to hold that the prosecution had also proven the element of trafficking. In the circumstances, Abdullah was ordered to enter on his defence.

[11] Abdullah's defence was essentially that he had no knowledge of the drugs. He testified that the drugs belonged to one Annie who stayed in the same room with him.

[12] In evaluating the defence, the learned trial judge made *inter alia*, a finding of fact that there was no personal documentation of any kind in the name of Annie found in the room. Neither was there any item to indicate the presence of a female.

[13] The learned trial judge concluded that the existence of Annie was concocted by Abdullah to exculpate himself. His Lordship found that Abdullah failed to rebut on a balance of probabilities the statutory presumption under s. 37(da) of the DDA and had failed to raise a reasonable doubt on the prosecution's case. Abdullah was thus convicted and sentenced to death.

[14] In the Court of Appeal, two grounds were advanced to support Abdullah's appeal ie, that the learned trial judge erred in admitting the statement under s. 27 of the Evidence Act 1950 and that the learned judge erred in failing to give due consideration to the fact that Annie had access to the room and the impugned drugs.

[15] The above grounds found no favour with the Court of Appeal. Abdullah's appeal was thus dismissed and the sentence and conviction affirmed.

Appeals No. 205, 206 And 207 (Reza, Hasan And Mahmood's Cases)

[16] Mahmood, Reza and Hasan, all Iranian nationals were jointly charged as the first, second and the third accused respectively, for an offence under s. 39B(1)(a) of the DDA. The charge against them reads:

Bahawa kamu bersama-sama pada 11/2/2012 jam lebih kurang 5.00 petang di seunit rumah No. 9, Jalan Dutamas Melor 1, Changkat Kiara Bayu Off Jalan Dutamas, dalam Daerah Sentul, dalam Bandaraya Kuala Lumpur, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 15,821 gram. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 38B(2) Akta yang sama serta dibaca bersama dengan seksyen 34 Kanun Keseksaan.

[17] The prosecution's case against them may be summarised thus. The police had conducted surveillance on No. 9, Jalan Dutamas Melor 1, Changkat Bukit Kiara Bayu ("the house") beginning from 6 February 2012 where movements by individuals as well as vehicles going in and out of the house were monitored. This was done from the adjacent Prima Duta Condo's water reservoir tank located within 500m from the said house, by using binoculars. For the purpose of recording movements of a white Proton Persona car with Registration No. WWB 1217 ("the car"), surveillance was also conducted at the gate of the guard post.

[18] On 11 February 2012 at about 4.50pm, the car was seen entering the gate and it stopped at the said house. One man was seen exiting the car and another was seen coming out from the house. Both were then seen entering the house. The police moved in. They broke the front door of the house. ASP Didi Fairuz bin Zainal Abidin ("SP8") immediately headed to the top floor of the house. He saw three men fleeing the house through the roof. One was described as wearing a white shirt and a long jeans while the other two were described as wearing shorts, and shirtless.

[19] From the prosecution's narrative, the three men fleeing the house were the accused persons who were then arrested and brought to the house. In the house, police discovered boxes of drugs containing 15,821g of methamphetamine alongside other evidence, which essentially established the fact that the house was used to manufacture drugs.

[20] The trial judge made positive findings that the three accused were in possession of the drugs and given the weight of the drugs, His Lordship invoked the presumption of trafficking under s. 37(da) of the DDA, to find that a *prima facie* case of trafficking had been established against the three accused. The three accused were thus ordered to enter their defence.

[21] In gist, Mahmood's defence was based on identification: it was contended that at the time of the arrest, he was not wearing a white shirt as asserted by the prosecution, but a blue floral shirt. Mahmood's version was that he was working at 1001 Nights Restaurant & Club as a delivery man and that he was at the house to deliver food. He denied fleeing the house through the roof.

[22] Reza and Hasan both relied on the same principal defence that they had no knowledge of the drugs. They contended that they only went to the house upon invitation of one Mehdi and that they had been spending time drinking until the time of the arrest.

[23] The learned trial judge found that the defences were bare denials and that all the accused had failed to rebut the presumption of trafficking on a balance of probabilities and had failed to raise a reasonable doubt on the prosecution's case. They were accordingly convicted and sentenced to death.

[24] On appeal, the Court of Appeal quashed Mahmood's conviction. The Court of Appeal found that the learned trial judge erred in law and fact in finding that Mahmood had custody and control of the impugned drugs. The conviction of Mahmood was found to be wholly unsafe, as there was no evidence to show that Mahmood resided at the house and that he was at the house during the whole operation. The Court of Appeal found that on the day the raid took place, Mahmood had been at the house for 8 minutes and this was held to be insufficient to establish custody and control of the impugned drugs on his part.

[25] As regards Reza and Hasan, the Court of Appeal found that the learned trial judge did not err when he found both Reza and Hasan to be in possession of the impugned drugs. From the direct evidence adduced by the prosecution which included the scientific evidence of DNA profile and fingerprints of Reza and Hasan which placed them on the fourth floor of the house where the drugs were found, the Court of Appeal opined that it was fair to infer that they must have knowledge of the drugs when they fled from the house to evade arrest.

Proceedings In The Federal Court

[26] Before us, Abdullah, Reza and Hasan raised a common point of law, ie, that the trial judge erred in invoking the presumption of trafficking under s. 37(da) of the DDA to hold that the prosecution had established a *prima facie* case.

[27] In essence, the arguments on this point of law are as follows:

(i) section 180(4) of the CPC required the prosecution to prove each ingredient of the offence by "credible evidence".

(ii) a *prima facie* case can only be found on "credible evidence". A statutory presumption does not amount to evidence;

(iii) no "credible evidence" had been adduced to prove the ingredient of trafficking;

(iv) as such, the trial judge was not entitled to find that a *prima facie* case of trafficking had been made out; and

(v) reliance on the presumption under s. 37(da) of the DDA is in breach of s. 180(4) of the CPC.

[28] In response, the prosecution submitted that:

(i) the presumption of trafficking under s. 37(da) of the DDA was introduced by Parliament to strengthen the law pertaining to drug offences and to assist law enforcers. The court should consider the intention of the Parliament in interpreting s. 37(da) of the DDA;

(ii) laws enacted by the Legislature are presumed to be constitutional. The court cannot give a Legislative provision a different meaning than what was intended by Legislature to avoid encroaching into the powers of the Legislature;

(iii) the presumption of trafficking under s. 37(da) of the DDA is a rebuttable presumption, and therefore does not deny the accused the right to a fair trial;

(iv) the presumption of trafficking is a common practice in other jurisdictions that advocate fundamental rights and equality;

(v) section 180(4) of the CPC is a law of general application for prosecution to establish sufficient evidence for *prima facie* case. The DDA is a specific law. Any conflict between the provisions in the two laws may typically be resolved by the maxim *generalia specialibus non derogant*; and

(vi) the presumption of trafficking under s. 37(da) of the DDA is credible evidence.

[29] Insofar as Reza and Hasan were concerned, they had also raised issues of fact in contending that the courts below erred in their findings on the ingredient of possession for the following reasons:

(i) that they had no custody and control of the drugs for the reasons that they were merely guests at the house;

(ii) that they were not the owners or tenants of the house;

(iii) that there was possibility of access by others;

(iv) that their fingerprints were not found on the impugned drugs;

(v) that undue emphasis was placed on the conduct of running away; and

(vi) that the surveillance team and the raiding team were unable to confirm the identity of the men seen coming in and out of the house and the men fleeing the scene during the raid.

[30] Reza and Hasan had further contended that their defence had not been adequately, fairly and sufficiently considered by the learned trial judge and the Court of Appeal, and that this non-direction amounted to a misdirection prejudicial to their conviction.

[31] On the prosecution's appeal, learned DPP essentially argued that the Court of Appeal erred in acquitting Mahmood as:

(i) the presence of Mahmood for 8 minutes in the house, taken together with the earlier surveillance, the escape and the arrest together with Reza and Hasan show that Mahmood had custody and control and knowledge of the impugned drugs;

(ii) the arrest of Mahmood was not accidental;

(iii) the surveillance on the car seen driven by a male, entering the house and staying for prolonged hours just five days prior to the arrest show knowledge and possession of the impugned drugs by Mahmood; and

(iv) it may be inferred from the presence of Mahmood together with Reza and Hasan before the raid and the immediate fleeing from the said house that there was a prior meeting of minds for the purpose of trafficking in the impugned drugs.

Our Decision

(i) Issue Of Law

[32] The point of law raised in these appeals concerns the interpretation of sub-ss. (1) and (4) of s. 180 of the CPC which read:

> **Procedure after conclusion of case for prosecution**
>
> 180.(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> ...
>
> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[33] Section 180(4) in its present form was introduced *vide* s. 22 of the Criminal Procedure Code (Amendment) Act 2006 (Act A1274). The original version of s. 180 reads:

> When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

[34] Act A1274 was enacted to provide for the standard of proof at the end of the prosecution's case. Prior to the Privy Council decision in *Haw Tua Tau v. PP & Other Cases* [1981] CLJ 123; [1981] CLJ (Rep) 11; [1981] 2 MLJ 49, the consistent judicial opinion was that at the close of the prosecution's case, the burden on the prosecution was to adduce evidence to prove their case beyond all reasonable doubt. The judge must not necessarily accept all

the prosecution evidence at face value, but must weigh the evidence to decide whether it is safe to convict upon such evidence standing alone (see *PP v. Chin Yoke* [1939] 1 LNS 66; [1940] MLJ 47; *The PP, Johore v. Fong Ah Tong And Cheong Chi Shen* [1940] 1 LNS 110; [1940] 1 MLJ 240; *Soo Sing & Ors v. PP* [1951] 1 LNS 86; [1951] 1 MLJ 143).

[35] The legal position was altered by the Privy Council decision in *Haw Tua Tau* (*supra*), an appeal from the Singapore Court of Criminal Appeal. In interpreting the Singaporean equivalent of s. 180 of the CPC, Lord Diplock held that:

(i) the section only required the prosecution to make out a case against the accused by adducing some evidence of primary facts;

(ii) the test at the close of the prosecution's case is a pure hypothetical question of law, ie, whether there is some evidence (not inherently incredible) which, if the court were to accept as accurate, would establish each essential element of the offence. It is not a question of fact as to whether the prosecution has already establish a case beyond reasonable doubt against the accused;

(iii) at the close of the prosecution's case, the court must act on the presumptions that:

(a) all evidence of primary facts is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and

(b) there will be nothing to displace inferences as to further facts which would reasonably be drawn from the primary facts, in the absence of any further explanation.

[36] The decision of the Privy Council suggests that at the close of the prosecution's case, the court is only required to undertake a minimal evaluation of the evidence. When the court finds that the prosecution has made out a *prima facie* case, it merely means that the facts are not inherently incredible and there is some evidence that goes to each essential element of the offence (see *Mallal's Criminal Procedure*, 6th edn (Kuala Lumpur: MLJ, 2001) at I3161).

[37] *Haw Tua Tau* led to a series of conflicting decisions. In *Khoo Hi Chiang v. PP & Another Case* [1994] 2 CLJ 151; [1994] 1 MLJ 265 and *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1, our apex court expressly departed from *Haw Tua Tau*. It was held that at the close of the prosecution's case, the court must undertake a maximum evaluation of the prosecution evidence to determine whether the prosecution has established the charge against the accused beyond all reasonable doubt.

The 1997 Amendment

[38] In order to re-establish the *prima facie* test, in 1997, Parliament *vide* Criminal Procedure Code (Amendment) Act 1997 (Act A979), amended s. 180 of the CPC. The amended s. 180 of the CPC reads:

> 180(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[39] The purpose of the amendment was to reinstate the law as stated in *Haw Tua Tau*, and to thereby depart from *Khoo Hi Chiang* (*supra*) and *Arulpragasan* (*supra*). The amendment was to clarify that the standard of proof at the close of the prosecution's case is *prima facie* and not beyond reasonable doubt (see Hansard, House of Representatives, Second Reading of Criminal Procedure Code (Amendment) Bill 1996 on 18 December 1996 at pp. 13 to 16, 47 to 48).

[40] The amendment however did not lead to a return to *Haw Tua Tau*. Subsequent to the amendment, in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65; *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301; and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393, the courts in interpreting the amended s. 180 CPC, have held that:

(i) to establish a *prima facie* case, the prosecution must adduce evidence beyond reasonable doubt, such that the evidence must be sufficient to convict the accused if he remains silent; and

(ii) the court must undertake a maximum evaluation of the prosecution's evidence, including carefully scrutinising the credibility of the prosecution witnesses.

The 2006 Amendment

[41] It was against the background of these decisions that s. 180 of the CPC was again amended by Parliament in 2006 *vide* Act A1274 to insert sub-s. (4) in the present terms (see Hansard, House of Representatives, Second Reading of Criminal Procedure Code (Amendment) Bill 2004 on 13 July 2006 at p. 32). By tracing its legislative history, it is apparent that the whole purpose of s. 180(4) of the CPC was to clarify Parliament's intention for the threshold to be applied at the close of the prosecution's case.

[42] The purpose of s. 180(4) CPC was thus not to exclude the use of presumptions, inferences, or anything other than direct evidence, to establish a *prima facie* case. On the contrary:

(i) the Privy Council in *Haw Tua Tau* itself expressly envisaged that inferences may be drawn from the primary facts adduced, and the court must presume such inferences to be true at the close of the prosecution's case; and

(ii) statutory presumptions have often been invoked by the prosecution in order to establish a *prima facie* case of drug trafficking in previous cases. No concern was raised in Parliament as to the use of presumptions when considering amendments to s. 180 of the CPC (see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169; and *Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514).

[43] Section 180(4) of the CPC must be read in light of its context and legislative purpose. By so doing, the phrase "credible evidence proving each ingredient of the offence" in s. 180(4) means that the prosecution may prove each ingredient of the offence either:

(i) by adducing credible direct evidence of that ingredient;

(ii) by drawing inferences of fact, ie, adducing credible circumstantial evidence, from which the ingredient can be inferred; or

(iii) by invoking presumptions of law, ie, adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists.

[44] As to what constitutes 'a *prima facie*' case, the judgment of Vincent Ng J (as he then was) in *PP v. Ong Cheng Heong* [1998] 4 CLJ 209 is instructive. Although *Ong Cheng Heong* (*supra*) was decided prior to the amendment in 2006, we respectfully endorse His Lordship's views, at p. 225:

> What then constitutes a '*prima facie* case'? '*Prima facie*' means on the face of it or at first glance. … perhaps the most appropriate definition of 'a *prima facie* case' could be found in the *Oxford Companion of Law* (p. 987), which has it as: "A case which is sufficient for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, **but is not conclusive**". It would follow that there should be credible evidence on each and every ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected. (emphasis added)

A At p. 224, His Lordship said:

> … to me, maximum evaluation simply means evaluation, on a *prima facie* basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led, rather than the persuasive burden in terms of qualitative degree of proof.

B

[45] The only basis of learned counsel's contention that the presumption in s. 37(da) cannot be invoked to establish a *prima facie* case under s. 180 of the CPC, is that presumption is not evidence. Hence, it was argued that in relying on such presumption, it cannot be said that the prosecution has "adduced credible evidence proving each ingredient of the offence" under s. 180(4) of the CPC. The argument is premised purely on semantics.

C

[46] Indeed, a presumption is not evidence; rather, it is a rule of evidence stating how a particular fact can be proved, as supported by the following authorities:

D

> A presumption has no probative value and is not evidence, being nothing more than a rule of law which assists a party in making out a *prima facie* case" (see Michigan Law Review, "*Presumptions as Evidence in Criminal Cases*" at 504);

E

> Presumptions are a special mode of proving facts which must otherwise be proved by evidence. Where there is direct evidence to prove the presumed facts, the presumptions do not need to be applied (see *PP v. Chia Leong Foo* [2000] 4 CLJ 649 at 668).

[47] Presumptions of fact and law operate in every legal system. The use of presumptions has always been standard judicial practice. This court has endorsed the use of the presumption in s. 37(da) of the DDA by the prosecution to establish a *prima facie* case of drug trafficking. What is required of the prosecution is to adduce credible evidence of the basic facts (ie, the nature and amount of the drug, and possession), in order to rely on the presumption of trafficking in s. 37(da).

F

G

[48] In *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273, the issue was whether at the close of the prosecution's case, the court, in a trafficking case, could make a finding of 'custody and control' to presume possession and then on that presumption, further presume trafficking. This court held that the use of presumption over presumption was unduly harsh and oppressive. Nevertheless, it was unanimously recognised that the presumption of trafficking may be invoked only once a finding of actual possession is made. Chong Siew Fai CJ (Sabah & Sarawak) said the following at pp. 189 to 191, 195 (CLJ); pp. 287 to 288, 292 (MLJ):

H

I

> The wordings in sub-ss. (d) and (da) of s. 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. …
>
> In our view, there is clear undeniable distinction between the word 'deemed' used in s. 37(d) and the word 'found' employed in s. 37(da) of the Act. The 'deemed' state of affairs in s. 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody and control. Such presumptions as under s. 37(d) (and for that matter, the one under s. 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s. 37(da) connotes a finding after a trial by the court.
>
> …
>
> In our view, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.
>
> …
>
> We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s. 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s. 37(da) which, of course, is rebuttable.

[49] Applying the above passage in *Muhammed Hassan* (*supra*), 'based on evidence' therefore refers to the finding of possession and not the finding of trafficking (see also *PP v. Tan Tatt Eek & Other Appeals* [2005] 4 CLJ 460; [2005] 2 MLJ 685).

[50] Another case on point is *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89, where the accused was charged with corruption before the Sessions Court but was acquitted at the end of the trial. The question before the Privy Council was whether the legal burden shifted to the accused, and if it did, what was the requisite standard of proof. The relevant statute in that case also contained a presumption of corrupt intent. Lord Diplock observed as follows, at p. 92, in respect of how presumptions operate as regards the ingredients of an offence:

A Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual
B ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a (*sic*) fact's being "disproved" there can be no grounds in public policy for requiring that exceptional degree of certainty
C as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it, it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

D … in the absence of any statutory provision reversing the burden of proof the court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been "proved" or "not proved" by the prosecution upon whom the onus lies to prove it. It is merely another way of saying that the prosecution must not only prove the existence of the first two factual ingredients of the offence, *viz*. (1) that a gratification was
E paid or given to or received by the defendant and (2) that at the time of the payment, gift, or receipt he was in the employment of a public body, but must also satisfy the court that the circumstances in which the gratification was paid, given or received give rise beyond reasonable doubt to an inference of fact that it was paid, given or received with a corrupt motive. This is the ordinary way in which the prosecution satisfies the
F burden of proving the motive with which an act was done by the defendant where the onus of doing so lies with the prosecution. In their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist "unless the contrary is proved.

G

[51] In *In the Matter of Application No. 578 of 1940 To The Rent Assessment Board; Ex Parte Tan Swee Eng* [1941] 1 LNS 20; [1941] 1 MLJ 191, Terrell, Ag CJ (FMS) at p. 192 adopted and applied the rule of construction in *Webb v. Outrim* (1907) AC 81:

H When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later Statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to be the meaning which has been so put upon them.

I **[52]** The presumptions in s. 37(a) to (j) of the DDA have been in place since the promulgation of the Dangerous Drugs Ordinance 1952. The presumption of trafficking in s. 37(da) of the DDA was inserted in 1997. These statutory presumptions long pre-date the insertion of s. 180(4) of the

CPC in 2006. Therefore, when s. 180(4) of the CPC was introduced, Parliament is presumed to be aware of the existing law and of the specific manner and method in which trafficking cases are proved ie, on a presumption basis upon a finding of fact of possession. Had Parliament intended the drastic consequence of effectively repealing a long-established statutory provision, one would expect Parliament to have said so in clear terms (see *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 at para. [34] (CLJ); para. [33] (MLJ)).

[53] Furthermore, the DDA is a specific Act relating to and dealing with trials in respect of dangerous drugs. The CPC, on the other hand, is a law of general application. Where there is a conflict between a specific law and a general law, the conflict may be resolved in one of two ways. The first is *via* the maxim *generalia specialibus non derogant*. The second is the doctrine of harmonious construction.

[54] The former Federal Court had the occasion to consider the operation of the CPC and the DDA in *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119. In *Chew Siew Luan* (*supra*), the question was whether the provisions relating to bail in the CPC were applicable to a trafficking charge preferred under the DDA. The Federal Court unanimously held that the provisions of the DDA will apply to the exclusion of the CPC. This is what Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said:

> Now, the Criminal Procedure Code (F.M.S. Cap. 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act, 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act, 1967.
>
> The Dangerous Drugs Act 1952 (Revised – 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and "to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith". In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (A A426) and became operative on 10.3.1978. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. …
>
> It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and

A expressions used in a legislative measure must take their colour from the context in which they appear. … The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of section 41B of the Dangerous B Drugs Act in that regard. We should perhaps also observe *en passant* that any other construction would result in nullifying the purport and effect of the provisions of section 41B(1)(c) of the Dangerous Drugs Act …

[55] The above observation by the then CJ (Malaya) fits squarely into the present appeals. In that regard, the opening words of s. 37 of the DDA are C important. They provide: "In all proceedings under this Act or any regulation made thereunder …" and the section then sets out specific presumptions, in this case, of trafficking under s. 37(da). For convenience, the relevant portion of s. 37(da) of the DDA on presumption of trafficking is reproduced below:

D 37. In all proceedings under this Act or any regulation made thereunder:

(da) any person who is found in possession of:

…

(vi) 200 grammes or more in weight of cannabis;

E

….

(xvi) 50 grammes or more in weight of Methamphetamine;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be F trafficking in the said drug;.

[56] The fundamental rule in criminal law is that the prosecution must prove every element of the offence charged beyond reasonable doubt, and that the accused bears no onus of proof. This general rule is however subject to exceptions as there is a limit to what the prosecution can reasonably be G expected to prove. The English common law authorities codified in our written law affirmatively recognise that it is lawful in certain cases to shift the onus to the accused to exculpate himself in certain situations. These situations include defences which relate to facts especially within the knowledge of the accused including the proof of lawful authority; or where H a statutory presumption provides that a particular fact is presumed to exist unless the contrary is proved (see *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12; *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1; and *Jazlie Jaafar v. PP* [2020] 2 CLJ 28).

I

[57] The role of presumptions in the wider context of the criminal legal system may be simplified thus: where a statutory presumption is invoked to presume the existence of certain fact as being the ingredient of the offence, the onus then shifts to the accused to disprove the presumed fact on the balance of probabilities and to thereby exculpate himself from the charge. If he does so, he earns an acquittal. If he does not, he is guilty of the charge.

[58] Section 180(4) of the CPC and s. 37(da) of the DDA must be read harmoniously, applying the doctrine of harmonious construction. In a nutshell, the doctrine requires that the legislation be construed in a way which would achieve a harmonious result and that construction should favour coherence in the law (see *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2020] 1 CLJ 1; [2020] 1 MLJ 141 at paras. 78 to 79). A harmonious construction would limit 'credible evidence' to the actual finding of possession, as propounded in *Muhammed Hassan*, and once that is established successfully, it would invoke the presumption of trafficking. Defence will then be called on trafficking where the legal burden would shift to the accused to disprove trafficking.

[59] Reverting to learned counsel's interpretation of the two sections respectively of the CPC and the DDA and his argument that reliance on the presumption under s. 37(da) of the DDA is in breach of s. 180(4) of the CPC, those arguments if acceded to, would render s. 37(da) superfluous or in the words of this court in *Chew Siew Luan*, "would result in nullifying the purport and effect" of the provisions of s. 37(da) of the DDA. Further, to sustain learned counsel's argument that the learned trial judge was not entitled to find a *prima facie* case of trafficking by invoking the presumption of trafficking under s. 37(da), would render s. 37(da) otiose. Learned counsel for Abdullah indeed conceded during oral argument that his submission was in effect an attempt to convince us to do away with the presumptions regime of the DDA.

[60] On a proper construction, to make out a *prima facie* case under s. 180(4) of the CPC, credible evidence is still required for a *prima facie* finding of actual possession. It is then that the presumption of trafficking kicks in for the accused to disprove on a balance of probabilities that he did not traffic in the dangerous drugs. Any other construction would be against the weight of settled judicial precedent. It would also render the entire presumption regime superfluous, devoid of any utility and would effectively amount to a repeal of s. 37(da) of the DDA.

[61] To conclude on this issue, it is our unanimous view that having found that actual or affirmative possession of the impugned drugs by the accused had been established based on credible evidence and the weight of the drugs in question exceeded the statutory limit, the learned trial judges were entitled to find that a *prima facie* case had been made out under s. 180(4) of the CPC, by invoking the presumption of trafficking under s. 37(da) of the DDA. This approach is correct in law.

(ii) Issues Of Fact

[62] We now move to the issues of fact raised by Reza and Hasan, where they challenge the prosecution's version of their arrest. It was contended that knowledge and possession of the drugs stated in the charge had not been proven against them and that the learned trial judge had failed to adequately evaluate the defence case. For the record, learned counsel for Abdullah confined his oral and written submission on the issue of law as discussed above and did not pursue any challenge on the facts. For the record too, we are satisfied with the findings of facts by the courts below.

[63] In essence, the defence of Reza and Hasan was that they had been drinking with one Mehdi at the 1001 Nights Restaurant & Club. Mehdi had invited Reza and Hasan to his house which was the same house where the drugs were found. It was their evidence that Mehdi drove both of them to the house in a Mercedes Benz car. At the house, they continued drinking from a glass beaker until they fell asleep.

[64] The learned trial judge found their version, particularly relating to Mehdi, to be improbable for the reason *inter alia* that Mehdi was not immediately informed to the police and that the name Mehdi was only brought up during trial; that there was no Mercedes Benz car seen by the surveillance team and that there was no person by the name of Mehdi found at the house when the raid took place. The Court of Appeal found no error in the learned trial judge's assessment of the evidence. It formed the view that the learned judge was entitled to come to the finding as he did.

[65] The Court of Appeal had also considered the fact that Reza and Hasan did not own the house and neither were they tenants occupying it under any tenancy agreement. The tenancy agreement was in fact found to be fictitious and that someone had gone to great lengths to hide the actual tenancy. Notwithstanding, the Court of Appeal acknowledged the fact that Reza and Hasan were the only ones found in the house. Apart from the presence of Mehdi asserted by them, no other possibility was raised as to how they came to be the only ones at the house. And since they contended that they did not flee, which was contrary to the evidence of the prosecution's witnesses, no explanation was forthcoming from both of them as to why they had fled from the crime scene.

[66] We find no reason to depart from the findings of the Court of Appeal. At the time of arrest, Reza and Hasan were the only persons in control of the premises. We agree with the Court of Appeal that looking at the whole evidence, it is highly improbable that their presence was coincidental. If indeed Mehdi was the culprit and was the cause of their predicament, common sense dictates that they inform the police about Mehdi soon after their arrest, and not wait until trial. And even if Mehdi is a real character, the version as presented by Reza and Hasan could not have raised any reasonable doubt on the prosecution's case.

[67] Considering all the facts and circumstances of this case, we find no error in the inference drawn by the learned trial judge that Reza and Hasan knew that the substances found in the house were illicit drugs. The discovery of various apparatus, laboratory equipment and chemical substances in the house and the testimony of the chemist on the use and functions of those apparatus, equipment and substances, lend credence to the proposition that the house was used as a clandestine drug laboratory.

[68] We agree with the Court of Appeal that the overwhelming inference is that Reza and Hasan could not have no knowledge of what was transpiring in the house given the evidence that was adduced against them. More so, when the scientific evidence placed them at the fourth floor of the house where the impugned drugs were found. Although this was not the usual type of trafficking as it involved the manufacturing of drugs, based on the evidence of the prosecution, there was no error in the finding of the courts below that the element of custody and control and knowledge had been proven and that actual possession of the impugned drugs had been established.

[69] While we accept that there was an error of fact made by the learned trial judge in respect of Hasan's clothing when he was arrested, we are of the view that such error did not vitiate the conviction of Hasan and did not occasion a miscarriage of justice. We have taken the liberty to examine the appeal records and we find that on the totality of the evidence, the convictions of both Reza and Hasan are safe.

[70] In respect of Mahmood, the Court of Appeal found that there was no evidence establishing the fact that it was Mahmood who was seen entering the house during the surveillance period and none of the witnesses testified that it was Mahmood who was seen in the car. We find no appealable error in the finding of the Court of Appeal that Mahmood had been at the house for only 8 minutes when he was apprehended, and that this was insufficient to establish custody and control of the impugned drugs on his part.

[71] Significantly, despite the extensive scientific investigations at the house, no DNA or fingerprint of Mahmood was found on any items in the house. When apprehended, Mahmood had with him his passport and access card to his own apartment at another premises. When Mahmood was arrested, he was wearing clothes which did not match the description by SP8 as the someone that he saw fleeing from the house through the roof. Mahmood was wearing shoes when he was arrested and he was not injured, whereas Reza and Hasan were not wearing shoes and they were injured, which according to the prosecution's narrative, the injuries were sustained when Reza and Hasan jumped off the roof.

[72] Mahmood's version of his defence that he went to the house to deliver food was mentioned in his statement to the police. Although no investigations were carried out in this respect, there was evidence from other witnesses ie, Insp Kumbat anak Tan (SP21), Amir Mohamad Ghareh (SD2) and Hamidreza Rabiei Mohamad Taghi (SD5) that Mahmood was working at 1001 Nights Restaurant & Club.

[73] The above facts and circumstances in our view support Mahmood's version. We therefore see no reason to disturb the conclusion of the Court of Appeal that the element of possession was not proven by the prosecution against Mahmood.

Conclusion

[74] For the reasons adumbrated above, we find that:

(i) the proposed interpretation of s. 180(4) of the CPC to exclude presumptions is unsustainable as such a reading is unsupported by its legislative purpose, and leads to far-reaching consequences in criminal law;

(ii) on the totality of the evidence, the convictions of Abdullah, Reza and Hasan are safe. Their appeals are unanimously dismissed and their convictions and sentence by the courts below are accordingly affirmed; and

(iii) on the totality of the evidence, the conviction of Mahmood is unsafe. The prosecution's appeal is consequently dismissed and the order of acquittal and discharge by the Court of Appeal is affirmed.